FERNIE M. ROGERS

IBLA 77-9 Decided March 18, 1977

Appeal from a decision of the Alaska State Office dismissing a protest against Alaska homestead entry AA-5571.

Dismissed.

1. Patents of Public Lands: Effect

> The effect of the issuance of a patent, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to remove from the jurisdiction of this Department the consideration of all disputed questions concerning rights to the land.

APPEARANCES: Margie MacNeille, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Fernie M. Rogers has appealed to this Board from a decision dated September 3, 1976, by the Alaska State Office, Bureau of Land Management (BLM), dismissing as untimely his protest with respect to homestead entry AA-5571. 1/ Also on September 3, the Bureau transmitted a patent for this homestead to Esther Mary Ivey (formerly Wanda Jean Rogers), appellant's estranged wife.

The record discloses the following facts culminating in this appeal. On February 11, 1969, appellant filed his application for the above-designated homestead. Later that month appellant married

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1/ Appellant's request for reconsideration of the September 3 decision was denied by a subsequent decision issued on September 29, 1976.

Wanda Jean Rogers. In a letter to the BLM dated August 2, 1970, appellant's wife indicated that she and her husband had separated in January of that year. On November 15, 1971, Mrs. Rogers filed a homestead entry application, claiming homestead entry AA-5571 as a 'deserted wife.'

In a letter to the BLM dated April 24, 1972, she alleged the details of her husband's desertion, and on November 3, 1972, filed final proof, applying her husband's military service credit to reduce the residence and cultivation requirements. Effective January 31, 1975, Mrs. Rogers officially changed her name to Esther Mary Ivey. Notice that final proof had been filed was published weekly in a paper entitled Valdez-Copper Basin News from July 4 through August 1, 1975.

In a letter to the BLM dated October 15, 1975, appellant challenged his wife's claim to his homestead entry on the basis of abandonment. Ms. Ivey responded on April 15, 1976, with detailed counter-allegations and denials on the issue of desertion. The Bureau determined on the basis of Ms. Ivey's representations that she was in fact a deserted wife and issued her the patent on September 3, 1976.

The State Office based its decision dismissing appellant's protest on 43 CFR 1862.2 which reads:

> § 1862.6 Patent to issue after 2 years from date of manager's final receipt.
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> (a) The decision of the Supreme Court of the United States in Thomas J. Stockley et al., appellants, v. the United States, decided January 2, 1923 (260 U.S. 532, 67 L. ed. 390) holds that after the lapse of 2 years from the date of the issuance of the 'receiver's receipt' [2/] upon the final entry of any tract of land under the homestead, or desert-land laws, such entry, entitled to patent under the proviso to section 7 of the act of March 3, 1891 (26 Stat. 1098; 43 U.S.C. 1165), regardless of whether or not the manager's final certificate has issued.
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> (b) The Supreme Court of the United States in Payne v. U.S. ex rel. Newton (255 U.S. 438, 65 L. ed. 720), decided that Newton was entitled to a patent

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2/ "The receipts formerly issued by the receivers are now issued by the managers."

on his homestead entry under the proviso to section 7 of the act of March 3, 1891, 2 years having elapsed from the date of the issuance of the receiver's final receipt upon final entry, and there being no contest or protest pending against the validity of the entry, but stated that the purpose of the statute was:

> To require that the right to a patent which for 2 years has been evidenced by a receiver's receipt, and at the end of that period stands unchallenged, shall be recognized and given effect by the issue of the patent without further waiting or delay, and thus to transfer from the land officers to the regular judicial tribunals the authority to deal with any subsequent controversy over the validity of the entry, as would be the case if the patent were issued in the absence of the statute.

In his statement of reasons and his brief, appellant contends that BLM failed to follow the procedural prerequisites governing final proof by a deserted wife (43 CFR 2511.3-4(4)) in that he was not provided with notice nor afforded an opportunity for a hearing at which to deny the charges of desertion. Appellant asserts also that the BLM erred in its substantive determination that Esther Mary Ivey was a deserted wife, and in its dismissal of his protest as untimely. Appellant seeks a reversal of the decision and requests that the case be remanded.

The controlling circumstance of this case is that a patent has been issued to Esther Mary Ivey for a homestead sought by appellant. The effect of the issue of a patent, even by mistake or inadvertence, is to transfer the legal title from the United States and to remove from the jurisdiction of the Department the inquiry into disputed questions concerning rights to land. Basille Jackson, 21 IBLA 54 (1975); Everett Elvin Tibbets, 61 I.D. 397 (1954).

For these reasons we decline to consider the merits of the arguments presented by appellant. Since a patent has issued, they are not properly the subjects of further determination by this Board. We therefore return the case record to the Bureau of Land Management. Appellant, if he so desires, may take the matter up with the Office of the Solicitor, the Department's office in charge of litigation matters. Ethel Aguilar et al., 15 IBLA 30 (1974); Clarence March, 3 IBLA 261 (1971).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge